

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

To Be Argued by
Eugene Welch

77-2036

In The
United States Court of Appeals

For the Second Circuit

EDWARD NEWFIELD,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal From An Order of the
United States District Court for
the Western District of New York

**BRIEF FOR RESPONDENT-APPELLEE
UNITED STATES OF AMERICA
AND ADDENDUM**

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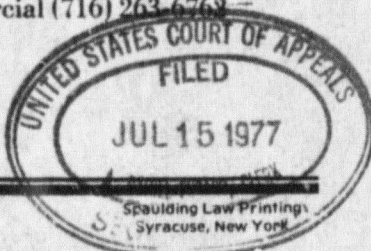


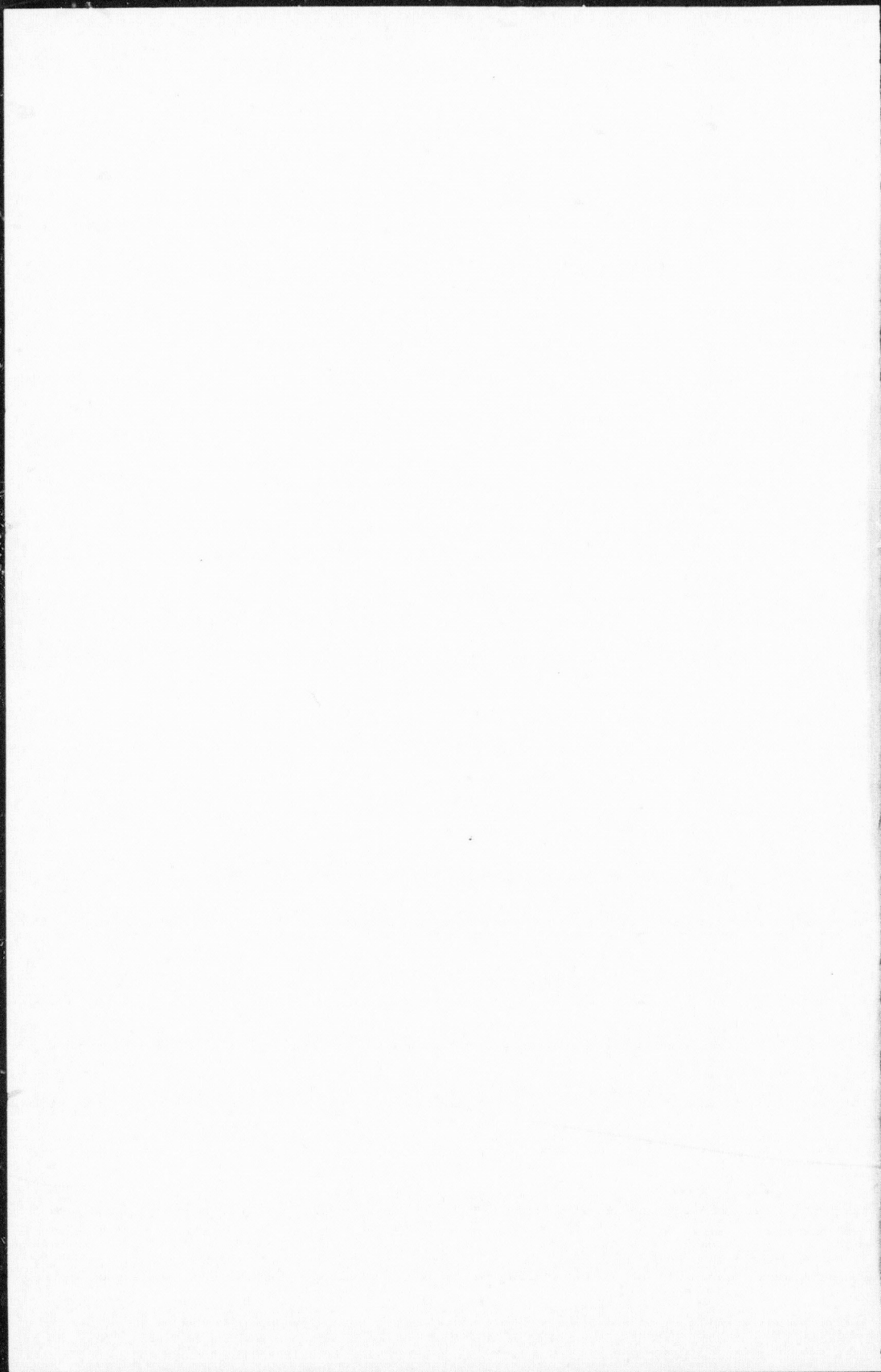
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**BRIEF FOR RESPONDENT-APPELLEE
UNITED STATES OF AMERICA
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Statement of Issues

I. Whether this Court of Appeals has jurisdiction to hear this untimely appeal?

II. Whether the trial court erred by failing to order automatically a psychiatric examination of appellant Newfield pursuant to 18 U.S.C. §4244 merely because he has a history of some mental illness.

III. Whether the trial court erred by failing to hold a hearing on Newfield's §2255 application which failed to state detailed and controverted issues of fact.

Statement of the Case

This is an appeal from orders of the U.S. District Court for the Western District of New York, the Honorable Harold P. Burke, denying appellant Newfield's successive applications pursuant to 28 U.S.C. §2255 to vacate his bank robbery conviction. As reconstructed from Appellant's Appendix and the Addendum to the Appellee's Brief, the pertinent history of the case is as follows.

On June 16, 1972 Edward Newfield was indicted for a December 1, 1971 bank robbery. In the fall of 1973 his own attorney arranged for Newfield's psychiatric evaluation by two different doctors, Dr. Edward Kaufman and Dr. Morris Herman. (See "F" and "H" of the Appellant's Appendix.) In these pre-trial psychiatric evaluations there is no mention of the defendant-appellant's competency. Apparently no motions for evaluation of competency under 18 U.S.C. §4244 were made by anyone at anytime in this case.

Newfield was subsequently tried before the Court and a jury and, on May 28, 1974, he was found guilty of bank robbery. As part of the presentence investigation and to aid the court in sentencing, the defense attorney submitted the two psychiatric evaluations made in the fall of 1973. On July 8, 1974 Newfield was sentenced to five years imprisonment to run concurrently with his parole violation sentence he was then serving as a result of an earlier bank robbery conviction.

Newfield filed a Notice of Appeal from this July 8, 1974 Judgment and conviction but subsequently, on February 10, 1975, he withdrew that direct appeal.

Almost one year later Newfield, who is now free on parole but at the time was in Lewisburg Penitentiary, filed his first §2255 motion alleging incompetency at trial which motion was denied by the trial court on February 13, 1976 by Order dated February 11, 1976. Newfield did not appeal this decision.

Instead, apparently dissatisfied with the first §2255 application filed by a "Next of Friend," Newfield, *pro se*, filed his second successive §2255 application raising the same issue of competency to stand trial. With this second application he also included the more favorable psychiatric evaluation of Dr. Kaufman dated October 17, 1973 (Appellant's Appendix "F") and an old psychiatric evaluation by the same doctor in 1966 (Appellant's Appendix "G"). This 1966 evaluation, interestingly enough, was prepared as a result of Newfield's §2244 motion in 1966. In that motion he had alleged he was not competent at the time he entered his earlier bank robbery guilty plea. That evaluation found that although he was suffering schizophrenic reaction, chronic undifferentiated type, he was competent at the time of his plea.

In this latest §2255 application to set aside his latest bank robbery conviction, Newfield, claimed he was incompetent at the time of his trial and used as a basis for his application, psychiatric reports of which he and his attorney were aware long before he went to trial. He also left out of this latest application the evaluation of Doctor Herman who felt Newfield was not suffering from schizophrenia but merely had the personality and character structure of a schizoid person (Appellant's Appendix "H"). The trial court, however, did have Doctor Herman's report as part of the files and records of the case from the presentence report.

By order of March 9, 1976 which was filed March 10, 1976 the trial court denied this latest §2255 application. Newfield next wrote to the trial court and asked for leave to file a Notice of Appeal *in forma pauperis*. That letter is attached as an Addendum to the Appellee's Brief. That letter was received by the Clerk for the Western District of New York on May 11, 1976, beyond the sixty day period during which Newfield could have appealed the March 9, 1976 Order which had been filed March 10, 1976. According to the notations on the letter it was

ultimately noted "Pauperis filing allowed H.P.B. U.S.D.J. 5/19/76" and filed as a Notice of Appeal May 20, 1976. It is as a result of that untimely Notice of Appeal filed over one year ago that this appeal is presently before this Court.

ARGUMENT

POINT I

This Court lacks jurisdiction in this matter because the Notice of Appeal was not timely.

On February 13, 1976, and on March 10, 1976, the United States District Court for the Western District of New York (Burke, J.), entered orders denying appellant Newfield's applications to vacate his conviction pursuant to 28 U.S.C. §2255.

Appellant Newfield subsequently stated, in a handwritten letter dated May 6, 1976, *inter alia*, that he wished to appeal from these orders and he further requested that such letter serve as his Notice of Appeal and as his petition to proceed *in forma pauperis*. (See Addendum to Government-Appellee's Brief).

This letter was received by the Clerk of the Court for the Western District of New York on May 11, 1976, and was filed as a notice of appeal on May 20, 1976.

As these facts indicate, a period exceeding (60) days elapsed between the entry of the District Court orders and the receipt by that court of the appellant's Notice of Appeal. Thus, this appeal is untimely.

Congress has specifically required by statute that for this Court to have jurisdiction over an appeal such as this, the notice of appeal must be filed within sixty (60) days, 28 U.S.C. §2107. This statutory limitation is implemented by the Federal Rules of Appellate Procedure, specifically Federal Rules of Appellate

Procedure 3 and 4, which require that a notice of appeal shall be filed within sixty (60) days of the date of entry of a district court order. Moreover, while Rule 3 permits discretion to be used in all the procedural aspects of an appeal, it specifically excepts the filing of a notice of appeal.

Therefore, if the notice of appeal is filed only one day late, this court has no jurisdiction to entertain the appeal.

"This time requirement applies to habeas corpus applications [citations omitted] even though the petitioner is not represented by counsel [citation omitted]," *Kapsalis v. Wilson*, 380 F.2d 365, 366 (9th Cir. 1967) *cert. denied* 389 U.S. 878 (1967).

As Rule 3 states in substance, the "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

In addition, Rule 26 (b), Federal Rules of Appellate Procedure, emphatically provides that this court may enlarge the time prescribed by these rules; but the court may not enlarge the time for filing a notice of appeal. Here again, while the court is permitted to use its discretion regarding most aspects of appellate procedure, an exception exists as to the filing of a notice of appeal.

It is important when consulting Rule 26 (b) to also consider Rule 2 Federal Rules of Appellate Procedure, which states in part that "a court of appeals may, except as otherwise provided in Rule 26 (b), suspend the requirements or provisions of any of those rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction."

As Rule 2 seems to indicate, a suspension of Rule 26 (b) regarding the timeliness of appeal is prohibited.

In summary, the record shows that appellant Newfield has filed an untimely notice of appeal. By so doing, he has denied this Court subject matter jurisdiction.

Furthermore, since neither the statute, 28 U.S.C. §2107, nor the Federal Rules of Appellate Procedure seems to provide any alternative but to dismiss his appeal for lack of jurisdiction, we respectfully submit that his appeal should be dismissed at this time. *Kapsalis v. Wilson*, 380 F.2d 365, 366 (9th Cir. 1967) Cert. denied 389 U.S. 878 (1967); *Gill v. United States*, 357 F.2d 334, 335 (5th Cir. 1966).

POINT II

The trial court did not err in failing to order a psychiatric examination of the appellant pursuant to Title 18, United States Code, Section 4244.

Although Title 18, United States Code, Section 4244 provides for an examination to determine an accused's competency to stand trial, it does not require that such an examination necessarily be ordered at all times. *United States v. Hall*, 523 F.2d 665, 667 (2d Cir. 1975).

All that is required is that the trial court exercise its discretion to determine if there is "reasonable cause to believe" that the defendant is incompetent to stand trial. *United States v. Hall*, 523 F.2d 665, 667 (2d Cir. 1975); *United States v. Vowteras*, 500 F.2d 1210, 1212 (2d Cir. 1974), cert. denied, 419 U.S. 1069 (1975).

The test of a defendant's competency to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him. *Dusky v. United States*, 362 U.S. 402 (1960); *United States v. Sullivan*, 406 F.2d 180, 185 (2d Cir. 1969).

However, the presence of a history of mental illness does not *per se* equate with incompetency to stand trial. *Baker v. United States*, 334 F.2d 444, 448 (8th Cir. 1964).

The appellant urges that the issue of competency was raised when the trial court was presented with his pre-sentence report (Brief of Appellant at 10-11). Annexed to this report were two letters which described the appellant's mental history. (Brief of Appellant, Appendix, F and H). These letters were written by psychiatrists who had examined the appellant. One letter was written by Edward Kaufman, M.D. on October 17, 1973 and the other by Morris Herman, M.D. and dated September 13, 1973.

Upon closer examination, however, these letters reveal that the trial court was not presented with sufficient facts which would reasonably cause it to believe that the appellant's mental condition was so suspect as to require the Court to order a psychiatric examination. *O'Neil v. United States*, 486 F.2d 1034, 1036 (2d Cir. 1973).

The Government is not attempting to discredit these letters, but merely seeking to explain precisely what they state. In this regard, the letters fail to indicate that the appellant was, in any manner, incompetent to stand trial. They merely provide some information as to the appellant's mental history and nothing more.

In fact, the letter of Dr. Kaufman, dated October 17, 1973 speaks more to sentencing recommendations than to the issue of competency. Dr. Kaufman states:

His symptoms can improve markedly in a psychotherapeutic relationship as they did during the process of his recent extended interview with me. It is also highly probable that his Schizophrenic process is helped by heroin and/or by methadone and that his use of these drugs can be attributed to his severe mental

illness (the exception rather than the rule in most hard core addicts). Further incarceration at this time would most likely cause a deterioration of his severe physical and mental illnesses. It would be far more advantageous to the client and ultimately to society if an alternate program would be considered. These alternatives include careful medical and psychiatric supervision, residential treatment and methadone maintenance. Preferably, all of these modalities could be made available to him and imposed upon him as a condition of parole. All of these treatment facilities are available at the Lower Eastside Service Center, although the residential program may not be receiving patients until Dec. 1973-Jan. 1974

Furthermore, Dr. Herman, in his letter dated September 13, 1973 states:

It is my opinion at this point that there are important personality deficits in this man. At certain times they appear greater than at other times. It is not clear that these deficits reached the intensity to be considered as psychosis, although in 1966 he was designated as schizophrenic. This can refer to a personality state, sometimes stated as schizoid rather than schizophrenic which does not ordinarily progress to a state of decomposition. It is also clear that great stress was endured by his return to addiction, his failure in employment, his heart attack, and later his fear of arrest. I cannot find sufficient symptoms at this time to diagnose schizophrenia but I can say that his personality and character structure are that of a schizoid person. Of overriding importance is his long addiction and its consequences with failure to adjust, and the need for money to feed the habit.

This letter, written by Dr. Herman, never states that the appellant may have been incompetent to stand trial. In fact, the Herman letter indicates that the appellant's mental condition is less serious than Dr. Kaufman suggests.

Therefore, as to the pre-sentence report, we respectfully submit that the trial court was not presented with sufficient facts which would have given it "reasonable cause to believe" that the appellant may have been incompetent to stand trial.

Furthermore, while the appellant urges that the trial court erred in failing to order a psychiatric examination, the record fails to show and the appellant fails to allege that his trial counsel requested such an examination. Yet it cannot be doubted that the information contained in the pre-sentence report was within the trial counsel's knowledge.

As the appellant would have this Court believe, it was solely the government and the trial court who failed to request or to order that the appellant receive a psychiatric examination.

However, Title 18, United States Code, Section 4244 also permits the appellant to submit a motion for a judicial determination of his mental competence. As already indicated, the appellant's trial counsel was aware of his client's mental history, yet there is no indication that such a motion was made on behalf of the accused.

We do not wish to imply, nor does the appellant allege, that his trial counsel was less than competent. However, what we do suggest is that neither the trial court, the government, nor appellant's trial counsel were alerted by a "flurry of warning flags" to the possibility that the appellant might have been incompetent to stand trial. *Saddler v. United States*, 531 F.2d 83, 87 (2d Cir. 1976).

We respectfully submit that the pre-sentence report was submitted solely for sentencing purposes and in so doing, the appellant in no way, gave the trial court, the government or his counsel "reasonable cause to believe" that he might have been incompetent to stand trial.

Apparently, the appellant is seeking to have this Court establish a rule whereby, upon a showing of a history of mental illness, a trial court or the government must order a psychiatric examination. This is not what Title 18, United States Code, Section 4244 requires.

Examinations of an accused to determine his competency to stand trial are governed by 18 U.S.C. §4244, which requires of the federal courts what *Pate v. Robinson*, 383 U.S. 375 (1966), found to be constitutionally required: an inquiry into competency at any time there is reasonable cause to believe that the accused may be incompetent. The statute provides that whenever a party or the court "has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense . . . , the court shall cause the accused" to be examined by a psychiatrist as to his mental condition. 18 U.S.C. §4244 see *United States v. Marshall*, 458 F.2d 446, 450 (2d Cir. 1972).

However, it would be a misuse of the statute to routinely order psychiatric examinations. An examination is not to be granted *ex mero motu*, and an order for such an examination is not a perfunctory or ministerial act. Rather, the ordering of such an examination requires an exercise of judicial discretion to determine if there is "reasonable cause to believe" that the defendant may be incompetent. *United States v. Hall*, 523 F.2d 665, 667 (2d Cir. 1975); *United States v. Vowter*, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1975); *Zovluck v. United States*, 448 F.2d 339, 342-3 (2d Cir. 1971) *cert. denied*, 405 U.S. 1043 (1972).

In making this determination, the observations of the appellant by the trial court and other parties play an important role.

During the appellant's trial which took place between May 21, 1974 and May 28, 1974, the trial court and others had ample opportunity to assess the demeanor and appearance of the appellant. Thus, they would have noticed whether or not the appellant displayed any extraordinary or unusual behavior at trial. Yet on July 8, 1974, when the appellant was sentenced, the trial court, even in light of the pre-sentence report, failed to find "reasonable cause to believe" that the appellant was incompetent to stand trial.

Apparently, the reason why no psychiatric examination was either requested or ordered is that the appellant, at no time, gave either the trial court, the government or his own counsel "reasonable cause to believe" he was incompetent. Also, his trial counsel was fully aware of his mental history and would certainly have been careful to note any incompetent behavior.

Furthermore, we respectfully submit that the presentence report which contained information concerning the appellant's mental history, was not submitted to raise the issue of competency, but was submitted solely for sentencing purposes. In addition, as we have shown, this report contains conflicting opinions as to the appellant's mental condition.

As Dr. Herman's letter suggests, the appellant's "personality deficits" vary over a period of time. Naturally, the appellant would like this Court to find that these "deficits" may have been greater during his trial. Such a finding is highly unlikely in light of the record and we respectfully submit that this matter was properly handled by the trial court.

Based on the trial court's observations of the appellant's demeanor and appearance and an otherwise lack of any reasonable cause to believe that the appellant may have been incompetent to stand trial it was not error for the trial court to fail to order a psychiatric examination, *United States v. Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975), especially where the ap-

pellant's trial counsel was equally aware of his clients' mental history, *Cf. United States v. Vowteras*, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1975) and failed to move for an examination.

Under the circumstances of this case, to request a court to order a competency hearing is, in effect, establishing a rule whereby the showing of any history of mental illness *per se* requires a competency examination. This is not what 18, U.S.C. §4244 requires and the trial court did not err in failing to order an examination of the appellant.

POINT III

The Trial Court did not err in failing to hold an evidentiary hearing based on appellant's §2255 application, where the application failed to state detailed and controverted issues of fact.

"Section 2255 does not grant an absolute right to an evidentiary hearing." *Patrick v. United States*, 310 F. Supp. 1267, 1269 (E.D. Mo. 1970), nor does the "language of the statute strip the district courts of all discretion to exercise their common sense." *Machibroda v. United States*, 386 U.S. 487, 495 (1962).

In fact, an important purpose underlying Section 2255 is to make use of the trial judge's familiarity with the proceedings when deciding attacks on convictions. *Mirra v. United States*, 379 F.2d 782, 788 (2d Cir. 1967), *cert. denied* 389 U.S. 1022 (1967).

And it is no less certain that the decision of a District Judge to deny an insufficient motion without a hearing is a matter properly within his discretion. *Machibroda v. United States*, 386 U.S. 487, 494-95 (1962), *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974), *O'Neil v. United States*, 486 F.2d 1034, 1036 (2d Cir. 1973), *Mirra v. United States*, 379 F.2d 782, 787 (2d Cir. 1967), *cert. denied* 389 U.S. 1022 (1967).

Indeed, it has been acknowledged that the purpose of presenting a motion pursuant to Section 2255 to the trial judge is so that he can make use of his personal knowledge of the trial occurrences in passing on claims for relief based on such occurrences. *Mirra v. United States*, 379 F.2d 782, 788 (2d Cir. 1967) citing *United States v. Smith*, 337 F.2d 49, 53 (4th Cir. 1964), cert. denied 381 U.S. 915 (1965).

In effect, the trial judge's observations constitute part of the "files and records" of the case.

In the present case, appellant Newfield has alleged in his §2255 application and motion for reconsideration that he was incompetent by reason of mental disorder. In support of this allegation, the appellant annexed two reports written by Edward Kaufman, M.D., one dated February 11, 1966, and the other dated October 17, 1973.*

Section 2255 provides in pertinent part:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

As we have already indicated, the reports of Dr. Kaufman and Dr. Herman present conflicting opinions as to the appellant's mental condition. Dr. Herman's report indicates that the appellant's mental condition is less serious than Dr. Kaufman suggests, and neither report states that the appellant is incompetent to stand trial.

In any event, the trial court, in ruling upon the appellant's §2255 application was not presented with any new or sufficient information concerning the appellant's mental competence to stand trial.

*It should be noted that the report of Morris Herman, M.D., dated September 13, 1973, which was part of the appellant's pre-sentence report, was not included with his §2255 application. Instead, his report was replaced by another Kaufman report.

Dr. Kaufman's 1966 report, written seven years prior to the §2255 application and finding him competent, presents insufficient facts as to the appellant's competency to stand trial in 1974. Nor does his 1973 report present facts concerning competency. Instead, it merely provides recommendations for sentencing and nothing more.

The appellant relies on *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971) and states that the facts surrounding his appeal are "stronger than those held sufficient to require a hearing" in the *Miranda* case. Brief for Appellant at 17.

In *Miranda*, this Court enunciated the following standard as to the circumstances requiring a §2255 hearing:

The general consensus of the courts which have considered the issue, therefore seems to be where no evidentiary facts are alleged to support a bald allegation of mental incompetence a hearing may not be required [citations omitted]. On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required. *Id.*, 437 F.2d at 1258.

We submit that appellant Newfield failed to raise "detailed and controverted issues of fact" which would require a hearing pursuant to 28 U.S.C. §2255.

In *Miranda*, the appellant was suffering from drug withdrawal symptoms and was given medication from August 12 at least until August 19, 1968. On August 16th he attempted suicide and on August 22, 1968, *Miranda* entered his plea of guilty. These are "detailed and controverted issues of fact" and not bald allegations concerning his competency. Of equal significance is the short time span during which these events took place. Thus, on the issue as to whether a competency hearing should have been ordered, we agree that the trial court in *Miranda* erred in failing to order a psychiatric examination.

Furthermore, in this court's most recent decision regarding the issue of competency to stand trial, *Wojtowicz v. United States*, 550 F.2d 786 (2d Cir. 1977), this Court again found "detailed and controverted issues of fact" and that case was remanded to the district court for a hearing on this issue.

The facts surrounding the *Wojtowicz* case are very similar to those in *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971). On appeal from a denial of his §2255 motion without a hearing, *Wojtowicz* claimed that on the morning of sentencing he attempted to take a drug overdose and slashed his wrists. Consequently, he claimed that he appeared in court later that morning with his wrists wrapped in bloody bandages, "unable meaningfully to comprehend his sentencing proceedings." *Wojtowicz* at page 790.

Wojtowicz' claims were supported by his attorney's affidavit which had been submitted in support of a Rule 35 motion. This affidavit alleged that the "appellant had inflicted injuries upon himself prior to sentencing and was in a deteriorated state." *Wojtowicz* at page 790.

Furthermore, affidavits by the *Wojtowicz* family and a psychiatric report were submitted in support of his §2255 application. This Court found that these factors lent some credence to the §2255 application and the case was remanded to the district court.

The inadequacy of Newfield's bald allegation of incompetence is highlighted by the absence of any supporting affidavits from anyone who would have been in a position to know if he was competent at the time of trial.

[I]t is not without significance that on this motion no affidavit is submitted by petitioner's trial attorney who, as the one with "the closest contact" with him during the trial certainly would have knowledge of whether petitioner understood the trial proceedings and was

competent to stand trial or able to confer with him; nor is there any explanation for the failure to submit such an affidavit.

Yanni v. United States, 420 F.Supp. 990, 992 (S.D.N.Y. 1976).

Thus, as viewed in light of this Court's decisions, it is apparent that appellant Newfield's §2255 application and supporting documents do not set forth "detailed and controverted issues of fact" which relate to his competency to stand trial.

Instead, his application includes only reports concerning his mental history and sentencing recommendations. Therefore, the applicant's claim is clearly distinguishable from the claim raised in *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971) and reliance on this case is misplaced.

Furthermore, while the appellant states that his "history of schizophrenia, a history which persisted until the time of trial, while not determinative of the issue of competency, was clearly relevant to the issue and provides a basis for a good faith belief that [the] appellant might not have been competent to go to trial and assist in his defense," (Brief for Appellant at 16), it is clear that the appellant is confusing the "reasonable cause to believe" test required by 18 U.S.C. §4244 with a less demanding good faith test. The test prescribed by 18 U.S.C. §4244 is objective and it requires factual support. On the other hand, the good faith test is subjective and need not be substantiated by fact.

Therefore, the appellant's attempt to equate a "reasonable cause to believe" test with a good faith test is clearly improper. The test required by 18 U.S.C. §4244 is substantially different from a good faith test and sufficient facts must be presented to meet the test required by this statute.

In summary, we respectfully submit that the motion and the files and records regarding the applicant's mental competency to stand trial failed to set out any "detailed or controverted

issues of fact" which would have required the trial court to hold an evidentiary hearing pursuant to 28 U.S.C. §2255. The files and records conclusively show that the appellant was entitled to no relief. It has been stated that prisoners are not entitled and need not be permitted to make bald charges of mental incompetency to stand trial for the purpose simply of obtaining an excursion from the penitentiary. [citation omitted]. Therefore, a balance must be struck between the practical and the theoretical, and this can best be done by the district judge. [citation omitted]. *United States v. Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971) citing *Nelms v. United States*, 318 F.2d 150, 154 (4th Cir. 1963).

When this inadequate motion is considered along with the files and records of the case it is clear that Newfield is entitled to no relief.

CONCLUSION

On the basis of the arguments above it is respectfully submitted that the orders of the trial court denying the §2255 motions should be affirmed.

Respectfully submitted,

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ADDENDUM TO APPELLEE'S BRIEF

A-1
NOTICE OF APPEAL

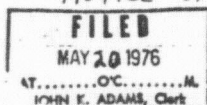
1135 Jefferson Street
Atlanta, Ga. 30318

May 6, 1976

Heins
6/8/88
5/19/76
Circ - 76-11

Office of the Clerk
United States District Court
Western District of New York
U.S.P.O. & Courthouse
Buffalo, New York 14202

NOTICE OF APPEAL



In re: Edward Newfield vs. U.S.A., Civil # 76-11

Dear Mr. Clerk:

I am writing with regard to the above captioned cause, which was brought pursuant to 28 U.S.C., Sec. 2255, in relation to Crim # 110-72. The Court (Judge Burke) denied the Sec. 2255 motion on March 9, 1976, and it is my wish to file a notice of appeal from that order.

As it occurs, I am presently confined in the Fulton County Jail, Atlanta, Georgia, having been brought here, without notice, by the government who wished to have me appear before a grand jury in a case not relevant to myself. At the present time I am in a quasi-incommunicado situation where I am far removed from friends and family and cannot readily effect access to a long distance telephone. In addition to the foregoing the United States Attorney here, (James A. Tapan A.U.S.A.), agreed to have the local Federal Public Defender's Office prepare a formal Notice of Appeal approximately one week ago but was called to Washington, D.C., and I have never had any advice from him or the Public Defender's Office in the premises.

Since the fifteenth of April 1976, I have been awaiting transfer to a federal prison facility, and even date do not know when my transfer will occur or where I will be located. This state of affairs has prevented me from advising my

Notice of Appeal

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family of my destination or making any intelligent projection as to when I may leave here.

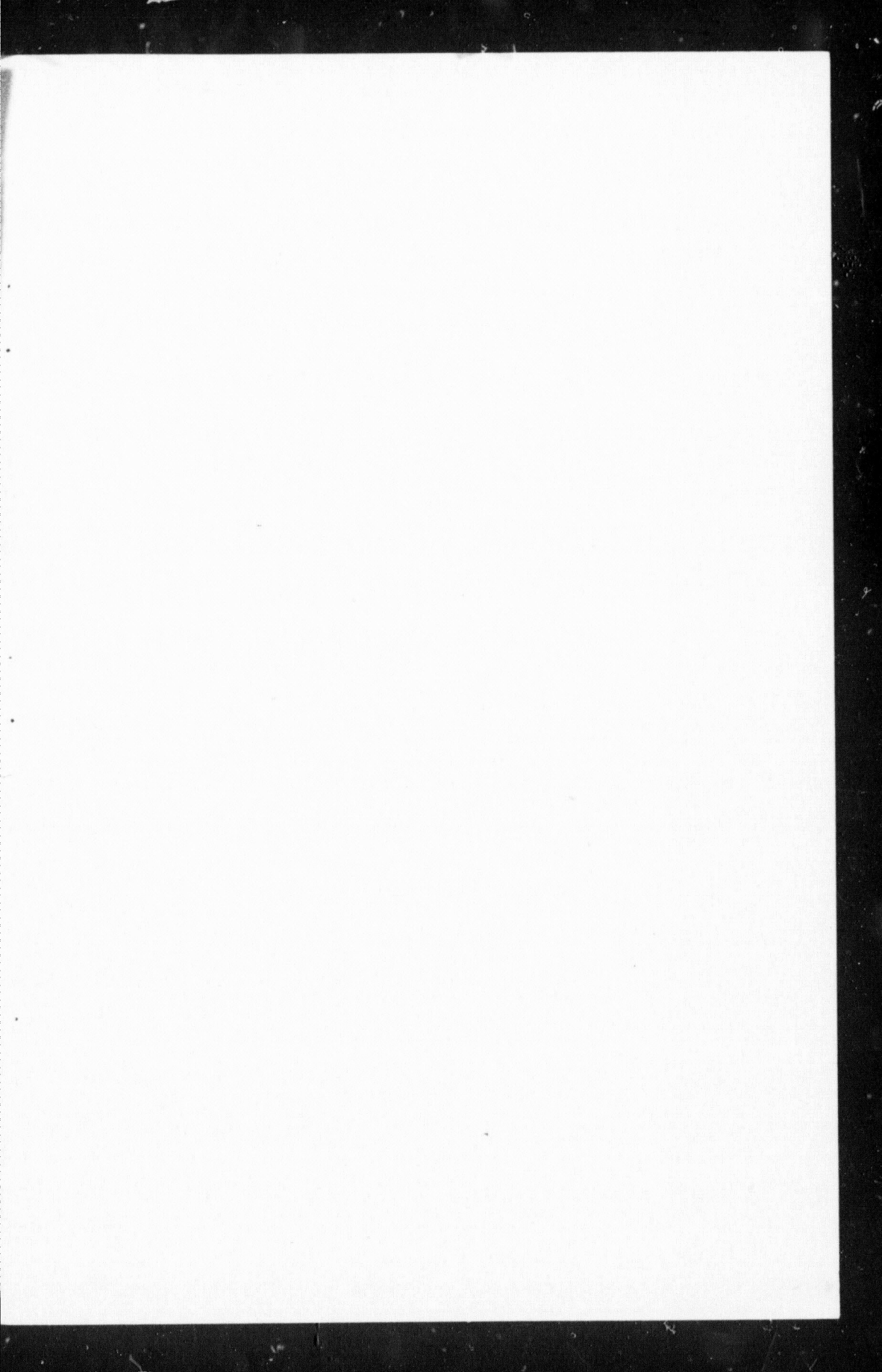
Under the circumstances it would appear that my sole recourse is to request that this letter be accepted as Notice of Appeal, (I do not recall the docket number assigned to the Sec. 2255 action), and that since I am presently incapable of making arrangements for the transmittal of the \$5 filing fee, this letter also serve as an application for leave to file the same in forma pauperis.

As soon as I am relocated at a federal institution I shall contact your office immediately to advise you of my location, and will also mail a formal notice of appeal. There are no facilities in this jail for the preparation of a notice and I believe the circumstances I have described herein are sufficiently exigent to justify my requesting the acceptance of this letter as Notice of Appeal and filing of the same without prepayment of fees or costs thereof.

I do not believe my right to appeal ought to be foreclosed when the Government is fully responsible for my present circumstances, and especially not when my appeal has great merit and involved a habeas corpus application, which presents factual allegations before the record, which if proven would fully entitle me to the relief sought as a matter of law.

Please advise me of whatever action is taken in the premises, as I will appreciate an acknowledgement of receipt of this letter.

Very truly yours,
Edward W. Newfille



Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay / Publisher
Russell D. Hay / Board Chairman

The Daily Record

July 11, 1977

Re:

Edward Newfield vs. United States of America

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Eugene Welch, Esq.

Attorney(s) for

Respondent-Appellee

On July 11, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
509 United States Courthouse
Foley Square
New York, New York 10007

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 11th day of July 1977

Kathleen S. King
Notary Public

Commissioner of Deeds

